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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 22

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, T. J. McCARTHY STEAMSHIP COMPANY AND AUTOMOTIVE TRADES STEAMSHIP COMPANY,

Appellants,

vs.

DETROIT AND CLEVELAND NAVIGATION COMPANY, GREAT LAKES TRANSIT COMPANY AND NICHOLSON UNIVERSAL STEAMSHIP COMPANY,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

BRIEF FOR APPELLEES.

ANGELL, TURNER, DYER & MEEK,
2104 Dime Building,
Detroit 26, Michigan,

MAYER, MEYER, AUSTRIAN & PLATT,
231 South La Salle Street,
Chicago 4, Illinois,

POPE & BALLARD,
120 South La Salle Street,
Chicago 3, Illinois,
Of Counsel.

JAMES TURNER,
WILLIS C. BULLARD,
2104 Dime Building,
Detroit 26, Michigan,
S. S. EISEN,
140 Cedar Street,
New York 6, New York.
ISAAC H. MAYER,
CARL MEYER,
231 South La Salle Street,
Chicago 4, Illinois,
ERNEST S. BALLARD,
120 South La Salle Street,
Chicago 3, Illinois,
Attorneys for Appellees.

October 2, 1945.

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BRIEF FOR APPELLEES.

OPINIONS BELOW.

The opinion of the District Court (R. 82-90) is reported in 57 F. Supp. 81. The report of Division IV of the Interstate Commerce Commission (R. 22-25) is reported in 259 I. C. C. 550 and the report of the full Commission on further hearing (R. 10-20) is reported in 260 I. C. C. 175.

JURISDICTION.

Appellants invoke the jurisdiction of this Court under sections 210 and 238 of the Judicial Code (28 U. S. C. A. secs. 47a and 345).

QUESTIONS PRESENTED.

(1) Whether the basic factual findings of the Commission when taken at their full face value are sufficient to justify its ultimate finding that future public convenience and necessity require the operation of appellant companies as common carriers of automobiles between certain designated ports on the Great Lakes.

(2) Whether the basic factual finding of the Commission that there was a past need for appellant companies' vessels can, on the evidence, mean anything more than that there was a need for the carrying capacity represented by those vessels.

(3) Whether the basic factual finding of the Commission that there will be a future need for appellant companies' vessels, if construed to be anything more than a prediction that there may be a future need for the carrying capacity represented by those vessels, has any substantial support in the evidence.

STATUTES INVOLVED.

The pertinent provisions of the Interstate Commerce Commission Act are set forth in the Appendix, *infra*, pages 71-74.

STATEMENT OF THE CASE.

This is an appeal from a decree of a three-judge statutory court, setting aside and annulling a final order of the Interstate Commerce Commission (R. 20-21) issued under Section 309 (c) of part III of the Interstate Commerce Act (49 U. S. C. A., Sec. 909 (c)) granting to the T. J. McCarthy Steamship Company, for itself and as managing agent of Automotive Trades Steamship Company, hereinafter referred to as the "appellant companies," a certificate of convenience and necessity for operating as common carriers by self-propelled vessels, in the transportation of motor vehicles between Detroit, Michigan, and all ports on Lake Erie and between Detroit and ports on Lake Superior.

The appellants are the United States of America, the Interstate Commerce Commission, and the appellant companies. The appellees, plaintiffs in the court below, are the Detroit and Cleveland Navigation Company, a Michigan corporation, hereinafter referred to as the "D. & C. Company," Great Lakes Transit Corporation, a New York corporation, and Nicholson Universal Steamship Company, a Delaware corporation, each of which has the authorization of the Interstate Commerce Commission to operate as a common carrier of motor vehicles by vessels on the Great Lakes (R. 2).

THE FACTS.

Proceedings Before the Commission.

On May 31, 1941, the appellant companies filed separate applications with the Commission (R. 602-611, 624-633), which applications were amended on October 18, 1941 (R. 611-621, 633-646), by which they sought certificates of

public convenience and necessity under the provisions of Sections 309 (a) and 309 (c) of the Interstate Commerce Act authorizing their operation as common carriers by water, in interstate or foreign commerce, in the transportation of motor vehicles between Detroit, Michigan, on the one hand and Cleveland, Ohio; Buffalo, New York; and Erie, Pennsylvania, on the other hand, and between Buffalo and Cleveland.

Hearings were had on the applications before an Examiner, evidence was taken and the Examiner made a report. The issues were argued orally before Division IV of the Commission, which rendered a report denying the applications on November 25, 1942 (R. 21-25). All members of the Division concurred in finding that the appellant companies were not entitled to a certificate under Section 309 (a) of the Act, since neither was in bona fide operation as a common carrier on January 1, 1940. The majority of the Division, one member dissenting, also held that the evidence submitted was not sufficient to support a finding that present or future public convenience and necessity required operation of the appellant companies as common carriers and denied the application under Section 309 (c).

On January 4, 1943, the appellant companies filed a petition for reconsideration and rehearing. On May 28, 1943, the proceedings were reopened and assigned for a rehearing on June 4, 1943, and a rehearing was held on that date (R. 4, 34).

On March 7, 1944, the Commission made a report and finding in which it confirmed the action of Division IV denying the appellant companies a certificate under Section 309 (a) of the Act, but in which it was found (four of the nine members dissenting) that the appellant companies were entitled to a certificate under Section 309 (c) of the Act (R. 10-20).

On the same date, March 7, 1944, the Commission entered an order authorizing the appellant T. J. McCarthy Steamship Company for itself, and as managing agent of appellant Automotive Trades Steamship Company, to operate as a common carrier by self-propelled vessels, in interstate and foreign commerce, in the transportation of motor vehicles between Detroit, Michigan, and all ports on Lake Erie and between Detroit and ports on Lake Superior, the order to become effective from and after June 3, 1944 (R. 20-21).

On April 19, 1944, the appellee Nicholson Universal Steamship Company duly filed a petition for reopening, reconsideration and postponement of the effective date of the order. By order of June 5, 1944, the Commission by a vote of five to four denied said petition. Subsequently the other two appellees in this suit filed like petitions for rehearing, etc., but were advised that the petition of the appellee Nicholson Universal Steamship Company for a rehearing, etc., had been denied (R. 73-74).

Summary of Evidence.

The appellant T. J. McCarthy Steamship Company was organized in 1935 and owns only one vessel, which it acquired in that year (R. 101). It does not appear when the appellant Automotive Trades Steamship Company was organized but it owns only two vessels, which it acquired in 1936 (R. 102, 181). In 1942 all of the three vessels were over forty years old (R. 128).

T. J. McCarthy, president of the T. J. McCarthy Steamship Company, owns 85 percent of the stock of that company and 80 percent of the stock of Automotive Trades Steamship Company (R. 123), and controls the activities of both companies (R. 174).

McCarthy first became connected with the appellee D. & C. Company in 1933 when he entered into an agreement with that company to solicit automobile freight for it on a percentage basis (R. 105, 298). He continued such solicitation under the original or similar agreements until February, 1937, when the agreement between him and the D. & C. Company was canceled and he caused the T. J. McCarthy Steamship Company to enter into a similar agreement with the D. & C. Company (R. 174, 306). The agreement between the two companies continued until February 4, 1942, at which time it was terminated because of the cessation of the manufacture of automobiles for civilian use (R. 313-315).

Under the agreement the McCarthy Company solicited automobile freight for and in the name of the D. & C. Company which acted as a common carrier of the automobiles (R. 129). The D. & C. Company issued its own bills of lading on the automobiles carried (R. 120) and was in full operation of all the vessels on which the automobiles were carried (R. 115-119).

In the fall of 1933 the D. & C. Company put on two additional vessels to carry automobiles between Detroit and Buffalo and Detroit and Cleveland (R. 173-174, 300) and another in 1934 (R. 178). None of these vessels was owned by either of the appellant companies.

In 1937 at the time the D. & C. Company entered into the solicitation agreement with the McCarthy Company it also entered into a charter agreement with the two appellant companies whereby it chartered from them two vessels for the 1937 season with an option to renew the charters from year to year through the 1942 season (R. 122, 161-167, 294-295). It renewed the charter on these vessels for each year but the charter agreement was terminated on February 4, 1942, after the manufacture of new automobiles had ceased (R. 313-315).

In 1940 the D. & C. Company chartered the other vessel owned by the appellant Automotive Trades Steamship Company and operated it in the carriage of automobiles during the 1940 and 1941 seasons. It was not needed in that operation prior to 1940 (R. 181, 211).

As the business of the D. & C. Company as a carrier of automobiles increased, the company from time to time put into operation the vessels necessary to adequately care for the same (R. 181).

The appellant companies offered the evidence of three witnesses representing three manufacturers of automobiles who shipped automobiles from Detroit by water carrier to the effect that if in the year 1941 the three vessels of the appellant companies chartered by the D. & C. Company and operated by it for the carriage of automobiles from Detroit had been withdrawn from that service, the other vessels then being operated by the automobile carriers for the transportation of automobiles from Detroit would not have been sufficient to adequately take care of the automobiles shipped by water (R. 221, 228, 237). The representatives of three drive-away companies, that is, companies that picked up the automobiles at port of debarkation and continued the transportation overland, also testified to like effect (R. 246, 256, 271). This testimony will be discussed more in detail in connection with an examination of the Commission's finding. None of the witnesses called on behalf of the appellant companies testified or attempted to testify as to whether the carrying companies could have obtained other vessels in lieu of the vessels of the appellant companies had they been withdrawn from service. Evidence introduced by the appellees showed that other vessels would have been readily obtainable had the appellant companies' vessels been withdrawn from service (R. 491).

The above mentioned witnesses called by the appellant companies also testified that in their opinion after the war and when the manufacture of new automobiles is resumed, the appellant companies' vessels would be needed to aid in the transportation of automobiles on the Great Lakes, this prediction being based upon their testimony that they were needed in the past. None of said witnesses knew when the manufacture of automobiles would be resumed or in what volume (R. 222, 229, 239).

Appellee D. & C. Company has operated as a common carrier on the Great Lakes since 1868 and as a carrier of automobiles since 1933 (R. 489). Appellee Great Lakes Transit Corporation has operated as a common carrier on the Great Lakes since 1916 (R. 438). It does not definitely appear from the record when the appellee Nicholson Universal Steamship Company first began to operate as a common carrier on the Great Lakes, but over the years it had built up an outstanding reputation as a carrier of automobiles (R. 485, 536). In 1935 and 1936 some of its automobile carriers were idle throughout the entire season and in 1937 they were converted into bulk carriers as the automobile tonnage in that year did not warrant their retention as automobile carriers. although it was an "abnormal year" and "second in the production of automobiles" (R. 549-550).

Appellee Nicholson Universal Steamship Company also produced evidence showing that it had a very large unused capacity for automobile carriage on the Great Lakes in 1940 (R. 537-539, 595).

Early in 1942 the production of automobiles for civilian use was stopped (R. 401). Under the great pressure for transportation facilities in other fields, the vessels of the various companies, being no longer usable as automobile carriers except for a relatively small number of automo-

biles and trucks for Government purposes which were carried on the decks of the bulk freighters, were in large measure diverted to other fields essential to the war effort (R. 483, 477-478).

CONCLUSION OR FINDING OF THE COMMISSION.

The majority of the Commission summarized its conclusion as to what was shown by the evidence in the case in the following language (R. 17):

> "The record establishes that there was a definite need for applicants' *vessels* in the transportation of motor vehicles between Detroit and Lake Erie ports prior to the cessation of the manufacture of motor vehicles for civilian use. It also shows with reasonable certainty that there will be a like need for *them* in that service at the termination of the war or when normal production and shipment by water of motor vehicles for civilian use are resumed. Witnesses representing manufacturers producing the bulk of the automobiles at Detroit testified as to this need in the future, not only as to transportation between Detroit and Lake Erie ports but also as to Lake Superior ports; that in the absence of applicants' *vessels* it would not have been possible for the water carriers to have handled the automobiles offered for transportation in 1940 and 1941, and that with the resumption of automobile manufacture the use of applicants' *facilities* will be necessary in the handling of such traffic. Refusal of applicants' right to initiate such operations with their own vessels might seriously impair their investment in those vessels and while that fact is not controlling, the refusal would according to this record deprive shippers of necessary transportation facilities which would not be in the public interest.'"*

Although in its report the Commission made reference to some testimony, hereinbelow discussed, relative to some

* Italics ours throughout unless otherwise indicated.

slight delay in making shipments from Detroit in 1940 and 1941 (R. 14), it made no finding that the service in the past was inadequate and there was no evidence in the record to justify such finding.

Four members of the Commission, including the Chairman, dissented, stating that there was no evidentiary support in the record for a finding that future convenience and necessity required the operation proposed by the appellant companies (R. 19-20).

DECISION OF THE COURT BELOW.

The court below at the beginning of its opinion stated that factual determinations made by the Commission, if supported by evidence, are final (R. 82). It recognized the well established rule that the ultimate finding as to public convenience and necessity must rest upon the evidentiary findings of the Commission, and that if such evidentiary findings do not support the ultimate finding the latter cannot stand (R. 83-84). It took the view that the finding of the Commission that appellant companies' vessels were needed in the past to supply the needs of automobile manufacturers meant no more than that there was a need for the carrying capacity represented by said vessels. It stated that there was no finding to the effect that if the D. & C. Company had not chartered the vessels of appellant companies, there was no other carrying capacity it could have acquired, and that the uncontroverted evidence in the record established the contrary. It further stated that, accepting the Commission's finding of future needs based upon the past need for carrying capacity, it would seem to be clear that the shipping tonnage available before the emergency will again be available when the emergency passes (R. 86-87). It pointed out that the effect of the Commission's finding and order is

to introduce new and competing carriers into a field adequately served, without the definite need of the service being shown and that this was contrary to the clearly defined purpose of the Transportation Act (R. 88). It concluded its opinion upon the question by saying (R. 89):

> "We find ourselves, therefore, in accord with the four dissenting members of the Commission, including its chairman, when they say, 'the fact that the applicants' vessels were used as they were to carry automobiles prior to the present emergency and may be needed for that service when the production of automobiles is resumed, does not warrant the conclusion that there will be need for the operation of such vessels by applicants as a new carrier in the field. That will not increase the amount of service formerly provided,' and also when they say, 'The decision of the majority is based upon too many assumptions and suppositions to be sound as a matter of law.'"

SUMMARY OF ARGUMENT.

I. The ultimate finding of the Commission that future public convenience and necessity require the proposed service of the appellant companies must under the law be supported by basic factual findings, which findings must in turn be supported by substantial evidence.

II. The basic factual findings of the Commission do not in law afford a basis for its ultimate finding that present and future public convenience and necessity require the operations of appellant companies authorized by the Commission's order. This is true because:

1. The record does not establish a definite past need for the appellant companies' vessels as such but only for the carrying capacity which they represented and there is absolutely no showing that such carrying capacity would not have been made available by the operating companies had the vessels of the appellant companies not been used. The evidence is undisputed that other vessels were available had the appellant companies' vessels been withdrawn from use.

2. The Commission's finding that there will be a future need for appellant companies' vessels has no more support in the evidence than its totally unsupported finding as to the past need for them, and represents pure conjecture unsupported by any established fact.

3. Assuming arguendo that the Commission's finding means that appellant companies' presently owned vessels will be needed as automobile carriers in

the future, such finding does not justify an ultimate finding that public convenience and necessity require the operation of appellant companies as common carriers of automobiles.

This is true because:

A. The finding ignores the fact that a future need for the vessels may be met, as it was in the past, by a chartering of those vessels to one or more of the authorized carriers.

B. The need found is commensurate neither in time nor quantity with the services authorized, and can be met by granting appellant companies temporary permits as Congress by Section 311(a) of the Act clearly evidenced its intent any such need should be met.

C. The effect of the Commission's action is to grant two "grandfather" rights upon the basis of one prior carrier operation.

D. The Commission has made manifest that it failed to consider and entirely ignored the effect upon existing carriers of authorizing new carriers in the field.

III. Answering certain arguments of appellants, it appears that substantial portions of the briefs of both the appellant companies and of the Commission consist of a search of the record and the advancement of reasons which it is conceived might, in the minds of the Commission, have substantiated its ultimate finding of convenience and necessity. This is a futile endeavor. The failure of the Commission to make the necessary findings cannot be so remedied. The Court cannot search the record and make findings for the Commission in order that its action may be sustained.

The Commission made no finding that the services rendered by appellees in the past was inadequate, and the Court will not supply such finding by implication.

Appellants are in error when they claim that the Court below held that it is the policy of the Act to forbid any new competition in a field which has been adequately served. The Court below did not hold that a need for new and competing carriers in a field could not be shown in any case where the past services had been adequate; it held that such need had not, on the findings, been shown in this case.

The question of whether any findings, other than findings of inadequacy of past service, would justify the admission of new and competing carriers into the field, does not have to be determined in this case, since no other such findings were made. The case of *Interstate Commerce Commission* v. *Parker*, 65 S. Ct. 1490, indicates that, except possibly in unusual cases, a finding of inadequacy of past services would be necessary to justify admitting a new and competing carrier into the field.

ARGUMENT.

I.

THE ULTIMATE FINDING OF THE COMMISSION THAT FUTURE PUBLIC CONVENIENCE AND NECESSITY REQUIRE THE PROPOSED SERVICE OF THE APPELLANT COMPANIES MUST UNDER THE LAW BE SUPPORTED BY BASIC FACTUAL FINDINGS, WHICH FINDINGS MUST IN TURN BE SUPPORTED BY SUBSTANTIAL EVIDENCE.

The rule that an ultimate finding of public convenience and necessity must have support in basic factual findings is a rule of necessity and is of long standing. This Court has repeatedly stated that such is the law. In *Interstate Commerce Commission* v. *Parker*, 65 S. Ct. 1490 (decided June 18, 1945), this Court said, page 1492:

> "* * * A finding of public convenience and necessity was made, 42 M. C. C. at 726, but that ultimate finding must have been based on the proper statutory criteria *and must have had the necessary factual findings to support it.*"

The case of *U. S.* v. *Carolina Carriers Corp.*, 315 U. S. 475, involved an order of the Interstate Commerce Commission granting to a motor carrier a certificate of convenience and necessity under the grandfather clause of Section II of the Interstate Commerce Act. The Commission's order determined that only certain commodities could be carried and that some could be transported only between designated points in the territory involved. It was held that the portion of the Commission's order so limiting the right to carry certain commodities should be set aside because the basic or essential findings required to support that portion of the order were lacking. This Court examined the Interstate Commerce Act and found

that the rights of the applicant were to be determined by certain standards and said (pp. 488-489):

> "The precise grounds for the Commission's determination that only certain commodities could be carried and that only a few could be transported between designated points are not clear. It is impossible to say that the standards which we have set forth were applied to the facts in this record. Hence, as in *Florida* v. *United States*, 282 U. S. 194, 215, the defect is not merely one of the absence of a 'suitably complete statement' of the reasons for the decision; it is the 'lack of the basic or essential findings required to support the Commission's order.' And see *United States* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454, 464; *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 510-511. Congress has made a grant of rights to carriers such as appellee. Congress has prescribed statutory standards pursuant to which those rights are to be determined. Neither the Court nor the Commission is warranted in departing from those standards because of any doubts which may exist as to the wisdom of following the course which Congress has chosen. Congress has also provided for judicial review as an additional assurance that its policies be executed. That review certainly entails an inquiry as to whether the Commission has employed those statutory standards. If that inquiry is halted at the threshold by reason of the fact that it is impossible to say whether or not those standards have been applied, then that review has indeed become a perfunctory process."

The same rule was applied in *Howard Hall Co.* v. *U. S.*, 315 U. S. 495.

In *Saginaw Broadcasting Co.* v. *Federal C. Com'n*, 96 F. (2d) 554 (U. S. App. D. C.), the Court set aside an order of the Federal Communications Commission granting a permit for the construction of a radio broadcasting station upon the ground that the Commission's finding, which

was a statutory prerequisite to the issuance of a permit, that public convenience, interest or necessity would be served by the station, was not supported by the necessary basic findings. The court said (p. 559):

> "When a decision is accompanied by findings of fact, the reviewing court can decide whether the decision reached by the court or commission follows as a matter of law from the facts stated as its basis, and also whether the facts so stated have any substantial support in the evidence. In the absence of findings of fact the reviewing tribunal can determine neither of these things. The requirement of findings is thus far from a technicality. On the contrary, it is to insure against Star Chamber methods, to make certain that justice shall be administered according to facts and law. This is fully as important in respect of commissions as it is in respect of courts."

The court pointed out that in *Florida* v. *United States*, 282 U. S. 194, this Court had set aside an order of the Interstate Commerce Commission regulating certain intrastate rates on the ground that, although the Commission had made an ultimate finding in the language of the statute, it was not supported by basic findings, quoting from the opinion of this Court in that case as follows (pp. 560-561):

> "The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination, to the importance of which this Court has recently adverted * * * *but of the lack of the basic or essential findings required to support the Commission's order.* In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported."

The Court also cited and quoted from the case of *U. S.* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, and from the case of *K. & G. Ry. Co.* v. *Commerce Com.*, 340 Ill. 266, where the Supreme Court of Illinois had set aside an order of the Illinois Commerce Commission granting a certificate of convenience and necessity to a motor carrier upon the ground that the findings of the Commission were not specific enough to enable the court to review intelligently the decision of the Commission and ascertain whether the facts upon which the Commission had based its order afforded a reasonable basis therefor.

The Court then said (p. 561):

> "These decisions show that a reviewing court cannot properly exercise its function upon findings of ultimate fact alone, *but must require also findings of the basic facts which represent the determination of the administrative body as to the meaning of the evidence, and from which the ultimate facts flow.* Such findings are, we think, just as necessary in cases involving the application of the statutory criterion of public convenience, interest, or necessity set up by the Communications Act, as in those cases which under the Interstate Commerce Act require the application of the standard of unjust discrimination, or in those cases which under state public utility statutes require the application of the criterion of public convenience and necessity."

Petition for certiorari in that case was denied by this Court, 305 U. S. 613.

In *Colorado Inter. Gas Co.* v. *Federal Pow. Com'n*, 65 S. Ct. 850, which was a rate case, this Court said (p. 854):

> "We have repeatedly emphasized the need for clarity and completeness in the basic or essential findings on which administrative orders rest. *State of Florida* v. *United States*, 282 U. S. 194, 215, 51 S. Ct. 119, 125, 75 L. Ed. 291; *United States* v. *Baltimore & Ohio R.*

Co., 293 U. S. 454, 464, 55 S. Ct. 268, 273, 79 L. Ed. 587; *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499, 504, 505, 510, 511, 55 S. Ct. 462, 464, 465, 467, 79 L. Ed. 1023; *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 488, 489, 62 S. Ct. 722, 729, 730, 86 L. Ed. 971. Their absence can only clog the administrative function and add to the delays in rate-making. We cannot dispense with them for Congress has provided the standards for judicial review under this Act. § 19 (b). The courts cannot perform the function which Congress assigned to them in absence of adequate findings. *Nor are they authorized under § 19 (b) to make findings and substitute them for those of the Commission.*"

In *Atlantic Coast Line* v. *Florida*, 295 U. S. 301, this Court said (p. 306):

> "It was not enough to find that the intrastate rates were unreasonably low. It was not enough to state the conclusion that interstate commerce was unjustly affected. *It was necessary to find the facts supporting the conclusion*, as, for instance, that the revenues of interstate commerce would probably be increased if the rates for intrastate hauls were established at a higher level."

To the same effect is *U. S.* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, at page 504, and *Schechter Corp.* v. *United States*, 295 U. S. 495, at page 540.

In Vom Baur's *Federal Administrative Law*, Volume 2 (1942), it is said (p. 549):

> "An ultimate finding, although grammatically fitting constitutional and statutory requirements for application of a statutory mandate, need not be taken at its face value. On the contrary, an ultimate finding is a mere conclusion, insufficient as a finding, unless supported by basic findings, that is, detailed statements of the pivotal, constitutive facts which furnish a concrete factual basis for the conclusory ultimate finding."

At page 552-553:

"An important purpose of all findings is to enable the courts to discharge one proper function, that is to make sure that the administrative agency, in the discharge of its highly specialized and technical duties, has followed the statute. * * * What findings are basic is a practical matter; those are such which are needed to ascertain on what legal theory the agency has proceeded. And where these are absent an administrative order founded upon an ultimate finding alone is invalid and must be set aside. The legal theory can only be ascertained if the full factual situation is honestly disclosed."

Again at page 553:

"* * * Words must be honestly and accurately used. If a standard term such as 'unreasonable', 'unjustly discriminatory', 'public interest', 'public convenience and necessity', 'protection of investors', etc., could be given effect as a mere combination of letters without inquiring as to its true meaning and the applicability of that meaning to a particular factual situation, there would be no bounds to the assumption of power by administrative agencies. Constitutional limitations would in their turn become empty phrases. It would be impossible to prevent agencies from exercising power not conferred in order to effectuate personal whims, ulterior motives, or other extralegal considerations, under the guise of exercising lawful powers. Under our constitutional system this may not be done."

It is also elementary law that the findings of an administrative agency must be supported by substantial evidence or the order based on such findings cannot stand.

Thus Vom Baur says, Volume 2 (pp. 568-569):

"An administrative order which is based upon a finding on an administrative question which is not supported by substantial evidence must be set aside as arbitrary and a denial of due process. * * *

"The requirement of substantial evidence is one of the elements of a valid delegation of legislative power to an agency under the Constitution."

It is also said by the same author, at page 564:

> "* * * as a requirement of law, there must be a rational basis in evidence for the conclusions approved by the administrative agency."

In *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U. S. 88, the Court said (p. 92):

> "But the legal effect of evidence is a question of law. A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law and must, in the language of the statute, 'be set aside by a court of competent jurisdiction.'"

To the same effect are the *Chicago Junction Case*, 264 U. S. 258, at page 265, and *Louis. & Nash. R. R. Co.* v. *Finn*, 235 U. S. 601, at page 606.

II.

THE BASIC FACTUAL FINDINGS OF THE COMMISSION DO NOT IN LAW AFFORD A BASIS FOR ITS ULTIMATE FINDING THAT PRESENT AND FUTURE PUBLIC CONVENIENCE AND NECESSITY REQUIRE THE OPERATIONS OF APPELLANT COMPANIES AUTHORIZED BY THE COMMISSION'S ORDER.

We will not here repeat the basic factual findings of the Commission upon which it bases its order and which are set forth at page 9 of this brief.

These basic findings involve the determination of three things, namely: (1) that there was a definite need for the appellant companies' vessels in the past; (2) that there will be such need in the future when the production of automobiles for civilian use is resumed; (3) that such future need can be met only by authorizing the appellant companies to operate as common carriers.

We will discuss these three determinations in order:

1.

The Record Does Not Establish a Definite Past Need for the Appellant Companies' Vessels as Such But Only for the Carrying Capacity Which They Represented and There Is Absolutely No Showing That Such Carrying Capacity Would Not Have Been Made Available by the Operating Companies Had the Vessels of the Appellant Companies Not Been Used. The Evidence Is Undisputed That Other Vessels Were Available Had the Appellant Companies' Vessels Been Withdrawn From Use.

The statement or finding that there was a "definite need" for the three vessels of the appellant companies in the past is highly ambiguous in the light of the question which the Commission attempted to determine, namely, do public convenience and necessity require the operation of the appellant companies as common carriers of automobiles?

The finding might mean either one of two things, namely: (1) that there was a definite need for the carrying capacity represented by the three vessels, or (2) that there was a definite need for such carrying capacity which could have been met only by using the three vessels of the appellant companies.

The evidence in the record cannot possibly justify any but the first meaning, namely, that there was a need for the carrying capacity represented by the three vessels.

The Commission's statement is based on the testimony of witnesses representing manufacturers of automobiles at Detroit. Thus the Commission says: "Witnesses representing manufacturers producing the bulk of the automobiles at Detroit testified * * * that in the absence of appellants' vessels it would not have been possible for the water carriers to have handled the automobiles offered for transportation in 1940 and 1941" (R. 14). It appears from

the record that there were three witnesses from three automobile manufacturers who testified. The question asked them was whether it would have been possible to move on the remaining vessels of the companies operating on Lake Erie the 85,493 cars that were carried on the vessels of the appellant companies under charter to the D. & C. Company in 1941, if those vessels had been withdrawn from service. They stated it would not have been possible (R. 221, 228, 237). No mention was made of the year 1940 in the question to those witnesses. The Commission is in error in stating that they so testified as to 1940.

It is obvious that all this testimony means or can mean is that the carrying capacity represented by the three vessels was needed to move the automobiles in 1941 and this need was apparently predicated on the fact that there was a need at the peak of the season in October and November (R. 221, 228, 238). In other words, if a portion of the facilities supplied by the carrying companies to carry automobiles had been withdrawn, the facilities which remained would not have been adequate. There was no showing or attempt to show that if the three vessels of the appellant companies had not been available and chartered by the D. & C. Company at the beginning of the year 1941 for service in that year, that company would not or could not have elsewhere secured the needed vessels.

Witnesses connected with three trucking companies who hauled cars by truck from Buffalo testified that if the three vessels of the appellant companies had not been operated in 1940 and 1941 the water carriers could not have adequately transported the automobiles offered for transportation (R. 246, 256, 271), although no representative of any automobile manufacturer so testified as to the year 1940. One of the witnesses also testified there were so many cars put off the boats at Buffalo that if was neeessary to ship some away by rail which the truckers could not handle, and that

all carriers had difficulty at the peak loads of the season (R. 271-272). This testimony means no more than the testimony of the witnesses for the automobile manufacturers.

The vessels of the appellant companies carried 77,741 automobiles for the D. & C. Company in 1940 (R. 321).

During the 1940 automobile season, appellee Nicholson Universal Steamship Company operated the following number of steamers with the following carrying capacities per trip: Two with a carrying capacity of 450 each; one with a carrying capacity of 370; one with a carrying capacity of 360; one with a carrying capacity of 260; two with a carrying capacity of 70 each; one with a carrying capacity of 60; two with a carrying capacity of 50 each; and one with a carrying capacity of 35 (R. 534-535, 595).

A season comprises a normal period of 252 days of open navigation. During the 1940 season, due to a lack of available automobile tonnage, one of said boats with a carrying capacity of 260 automobiles per trip operated only 105 days; one with a carrying capacity of 360 per trip operated only 141 days; one with a carrying capacity of 450 per trip operated only 162 days; one with a carrying capacity of 360 per trip operated only 197 days; and one with a carrying capacity of 450 per trip operated only 194 days (R. 537-539, 595).

By the number of days operated is meant the number of days the vessels were actually in service with steam up even though temporarily tied up at Detroit awaiting a load of automobiles. The five vessels with a combined capacity of 1,890 cars per trip were tied up at the docks idle for a period of 461 boat days during the 1940 season. Throughout the open navigation season there was on the average two of these five large capacity vessels tied up each operating day of the season. This inactivity was the result of inadequate automobile tonnage available for transportation

on the lakes. If the 461 days had been utilized and the vessels so utilized had been loaded to their full capacity, the Nicholson Universal Steamship Company alone could have carried 87,342 additional automobiles to Buffalo if the vessels had been placed in that service, or 174,685 additional automobiles to Cleveland if placed in the Cleveland service (R. 537-538, 595).

This computation is criticized in the Commission's brief (pp. 43-44). But the testimony was that the 252-day operating season on which the computation is based "is a normal period of lake navigation in the automobile trade" (R. 539) and it is during such period that the automobile carriers should be ready to afford transportation facilities, even though during some portion of that period production of automobiles may be slowed down or suspended on the part of one or more manufacturers. In 1940 boats could be and were operated for a period of 252 days (R. 560, 562). In 1940 beginning with the month of April and extending into the month of December shipments of automobiles were made from Detroit to Buffalo and Cleveland, and shipments were made from Detroit to ports on Lake Michigan and Lake Superior beginning with April and extending into November (R. 594). If, pursuant to stipulation of counsel for appellee companies, 10 percent is deducted from the number of operating days and a corresponding deduction made in the automobile carrying capacity, the unused capacity of the Nicholson Company for 1940 is very large.

In addition to the said five vessels that company had a number of other vessels whose carrying capacity was not fully utilized (R. 538). This was true although the number of automobiles transported by the lake carriers in 1940 was 262,967, or almost double the number transported in 1938, and 65,000 in excess of the number transported in 1939 (R. 594).

In October 1940 the Nicholson Universal Steamship Company carried 29,000 automobiles. In April of that year it carried 15,000 less than in October, in May 6,000 less than in October, in June 10,000 less than in October, in July 23,000 less than in October, in August 28,000 less than in October, in September 6,000 less than in October, and in November 3,000 less than in October (R. 594).

These facts may explain why the witnesses for the three automobile manufacturing companies did not testify that if the three ships of the appellant companies had been withdrawn from service in 1940 the remaining automobile carrying ships could not have adequately handled the traffic.

There was certainly no shortage of automobile carrying vessels in 1939. One of the ships of the appellant companies, although acquired in 1936, was not converted into an automobile carrier until 1940. It was operated from 1936 to 1939 as a bulk carrier for such cargoes as it could get (R. 213). Mr. McCarthy testified that bulk shipping was very slow and slack on the lakes in 1939 and he was not able to get a cargo for that vessel until September of that year (R. 183); that it was converted into an automobile carrier and chartered to the D. & C. Company in the spring of 1940 and "we worked up enough automobile business to keep it busy" (R. 211).

As a matter of fact it is clear from the record that the D. & C. Company put on boats to carry automobiles whenever they were needed. As previously shown, the company put on two boats to carry automobiles between Detroit and Buffalo and Detroit and Cleveland in 1933 (R. 173-174, 300) and another in 1934 (R. 178). In 1937 they put on two of the appellant companies' boats and the third in 1940, which on McCarthy's own testimony was as soon as needed (R. 122, 161-167, 294-295, 181, 211).

That the boats of the appellant companies were not the

only boats that the D. & C. Company might have put in service is also shown by McCarthy's testimony (R. 181):

> "Q. Mr. McCarthy, at the time that the Automotive Trades Steamship Company purchased the Tremaine and Ingalls to handle this additional traffic, did you at that time have any discussions with officials of the Detroit & Cleveland Navigation Company?
>
> "A. I did.
>
> "Q. And what were those discussions and with whom did you have them? Or, rather, with whom did you have this discussion and about what were they?
>
> "A. With Mr. Wright (Freight Traffic Manager of the Detroit & Cleveland Navigation Co.), who wished to assure me, when I told him that the boats had been inspected and passed inspection, he assured me that there was no responsibility on the part of the D. & C. for our purchasing the boat and there was no liability for the D. & C. to use them and I at that time advised him that I was taking it on my own responsibility and hoped to develop sufficient business to use the boats and asked if in the event sufficient business was developed in accordance with an agreement we earlier had would they not put on the boats that I had purchased rather than chartering more outside boats from some other company and he said, Oh, yes; they would."

He also testified that "as the business gradually developed", the appellant companies' boats "were put on to handle the additional business" (R. 181). There is absolutely no evidence in the record in the least tending to show that if all three of the appellant companies' vessels had been removed from service at the beginning of the 1941 season, the D. & C. Company either could not or would not have made available vessels of sufficient carrying capacity to take their place. The evidence is all to the contrary. McCarthy was anxious that the D. & C. Company put on his companies' boats instead of getting others. This showed that he considered other boats available. On his own testimony they put on automobile carriers as fast as they were

needed. McMillan, the general manager of the D. & C. Company, testified that if they had not obtained the ships of the appellant companies "there were many other places they could have been readily obtained" (R. 491). There is not the least contradiction of this testimony anywhere in the record.

As previously stated, the mere fact, as testified to by witnesses from the automobile manufacturing companies, that if the appellant companies' boats had not been used for carrying automobiles in 1941, the other ships in that service would not have been able to properly handle the traffic, means nothing so far as the ability and willingness of the automobile carriers to supply adequate facilities for the carriage of all automobiles offered is concerned, except that it shows good management in not having an oversupply of boats that would not have been economically employed except at the peak of the season of a peak year in the automobile traffic.

The court below found, and stated that the brief of the Government and the Commission appeared to concede, that the finding that the vessels of appellant companies were needed to supply the needs of the automobile manufacturers in the past meant no more than that their carrying capacity was required. The court also stated that not only did the Commission not find that had the D. & C. Company not chartered the vessels of the appellant companies there was no other carrying capacity which it could have acquired, but that the record established the contrary (R. 86-87).

2.

The Commission's Finding That There Will Be a Future Need for Appellant Companies' Vessels Has No More Support in the Evidence Than Its Totally Unsupported Finding as to the Past Need for Them, and Represents Pure Conjecture Unsupported by Any Established Fact.

Summarizing the record before it the Commission said (R. 17):

> "The record establishes that there was a definite need for applicants' vessels in the transportation of motor vehicles between Detroit and Lake Erie ports prior to the cessation of the manufacture of motor vehicles for civilian use. It also shows with reasonable certainty that there will be a like need for them in that service at the termination of the war or when normal production and shipment by water of motor vehicles for civilian use are resumed. Witnesses representing manufacturers producing the bulk of the automobiles at Detroit testified as to this need in the future, * * * that in the absence of applicants' vessels it would not have been possible for the water carriers to have handled the automobiles offered for transportation in 1940 and 1941, and that with the resumption of automobile manufacture the use of applicants' facilities will be necessary in the handling of such traffic. Refusal of applicants' right to initiate such operations with their own vessels * * * would according to this record deprive shippers of necessary transportation facilities which would not be in the public interest."

These findings of the Commission joined with its assumption, unsupported by evidence, that the appellee companies might experience delay in restoring their automobile transportation facilities after the war (R. 17-18) are the basis upon which its order must be sustained, if it is sustained.

It has already been demonstrated that all the testimony of such witnesses as to the past need for appellant com-

panies' vessels meant was that there was in 1941 a need for the carrying capacity represented by those vessels. There was not even an attempt to show that had those vessels not been made available by one of the operating carriers, other vessels would not have been made available. The undisputed evidence is that other vessels would have been readily obtainable. Likewise all that the testimony of such witnesses as to the future need for appellant companies' vessels means is that they were of the opinion that the carrying capacity represented by appellant companies' vessels would be needed in the future. The Commission's finding of a future need, which is patently based on such testimony, cannot have any other meaning. The fountain, even when giving vent to prophecy, can hardly rise higher than its source.

These witnesses unequivocally admitted that they possessed no information as to when their companies would go back to the commercial production of passenger automobiles. They had no knowledge concerning the quantity of automobile carrying vessels that would be available for transportation if and when their companies resumed production. They had absolutely no knowledge of what the transportation conditions might be upon return of normal conditions. They had no knowledge of what the needs of their companies will be as related to the number of ships or ship carrying capacity that may be required when production is resumed. They showed a total lack of knowledge of the post-war shipping program being planned for the Great Lakes by the ship owners and operators (R. 222, 229, 239, 428, 431-432, 435).

As previously shown, the manufacture of automobiles for civilian use was terminated in January of 1942. Naturally vessels formerly devoted exclusively to the carriage of automobiles were largely diverted to other purposes since there were few automobiles to carry. Of course auto-

mobiles could still be transported on the decks of bulk carriers. There was uncontradicted testimony to the effect that the facilities of the D. & C. Company alone would be sufficient for the needs of the Army for the transportation of automobiles between Detroit and Lake Erie ports in 1943 (R. 478-479).

Each of the three appellee companies produced witnesses who testified as to the intention of the companies to supply adequate facilities for the transportation of automobiles on the Great Lakes when production is resumed.

Mr. Hewitt, vice president of the Nicholson Universal Steamship Company, testified: "The Nicholson Universal Steamship Company is known as a specialized carrier of new automobiles, and, with the cessation of hostilities, the Nicholson Universal Steamship Company intends to see that, for such tonnage as may be offered to it for transportation over the lakes, vessels are available to adequately handle such tonnage which may be offered" (R. 485).

He further testified that his company had practically reached a final agreement with one large bulk carrier through which a fleet of not less than 10 boats would be made available for the carrying of automobiles and that his company was pretty sure of having available not less than 30 boats when automobiles started moving again, with a reasonable certainty that it would have available more boats than would actually be required for the transportation of automobiles throughout the year including the peak periods, assuming that there would be peak periods in the future as in the past. He further testified he was of the opinion that his company would be able to take care of the situation as it might unfold from month to month and from year to year as it had done in the past (R. 483-485).

Mr. McMillan, the general manager of the D. & C. Company, testified that his company had in the past always sup-

plied the trade with sufficient equipment to take care of existing needs and that it fully intended to do likewise after the conclusion of the war; that at present the D. & C. Company was operating four vessels, all capable of transporting automobiles, that in 1941 the company operated six combined passenger and freight vessels and, in addition, four freight vessels for the carriage of new automobiles, and that it was the intention of this company to make such facilities or equivalent facilities available as might be required after the cessation of the war (R. 489-490).

Mr. Emblidge, vice president of the Great Lakes Transit Corporation, testified that that corporation had been operating as a common carrier on the Great Lakes since 1916, and that it is intended just as soon as the war is over to re-establish their carrier service at the earliest possible date so as to operate as fully as they had operated prior to the beginning of the war (R. 437-442).

Needless to say, the testimony of these witnesses as to the purpose of their respective companies to make available as needed the necessary transportation for automobiles on the Great Lakes stands undisputed.

As a matter of fact, what the future need for automobile carriers on the Great Lakes will be, and how rapidly it will develop, was at the time of the Commission's decision, and still is, a matter of pure speculation.

As has been demonstrated by the record, prior to the war there was always available an abundance of automobile carrying capacity which the appellee companies could have acquired if needed. It is a matter of common knowledge that after the last war there was a vast amount of unused shipping tonnage on the Great Lakes, with the result that a great number of ships were sold for scrap iron. It is also common knowledge that a far greater number of ships were constructed during the war just now ended, with the

result that there is every prospect there will be a correspondingly greater fleet of excess tonnage than existed at the end of World War I.

A ship can be converted to an automobile carrier in a very short time. Thus McCarthy testified that one of appellant companies' vessels was operated as a bulk carrier through the fall of 1939, was converted to an automobile carrier in the spring of 1940, and was operated "all during the season of 1940 by the D. & C. Navigation Company" (R. 120). Obviously, a ship can be converted into an automobile carrier between the close of navigation in one season and the opening of navigation in the next season.

Furthermore, appellant companies will not be dependent alone upon ships which must be converted to automobile carriers for carrying capacity when automobile production is resumed. Thus in the year 1943 the D. & C. Company alone carried 40,000 vehicles, which represented only about 75 percent of its capacity then available. In comparison with this the appellant companies carried no vehicles in 1943 and only 950 in 1942 (R. 521).

The keystone of the Commission's finding that the vessels of appellant companies will be needed to carry automobiles in the future is that automobile manufacture will be restored after the war to the point of creating a demand for lake transportation before the traditional automobile carrying ships will again be able to handle the traffic. That assumption is barren of any justification in the record. In view of the foregoing considerations, it is an exceedingly violent assumption.

The evidence of appellee companies was that they were uncertain as to when their operations would be resumed, and, as previously shown, the representatives of the automobile manufacturers testified positively that they did not know when the production of automobiles would again reach

the point requiring water carriage, yet the Commission assumed the latter would antedate the former. Such a conclusion is not only not supported by substantial evidence; it is not supported by any evidence and is therefore conjectural, speculative, arbitrary and capricious. Furthermore, it is directly contrary to any reasonable conclusion that may be drawn from the known facts.

It is impossible to reconcile the action of the Commission in this case with the disposition made of other and related matters. In *Lykes-Coastwise Line, Inc., Applications*, 260 I. C. C. 201 (decided Feb. 12, 1944), the steamship line involved, after years of operation between North Atlantic ports and Gulf port cities, sold its vessels to the British Government immediately prior to the January 1, 1940, "grandfather" date. The Lykes-Coastwise Line filed applications seeking rights to resume service. The Interstate Commerce Commission dismissed the "grandfather" application. As to the proof adduced relative to public convenience and necessity, Division IV had this to say (p. 205):

> "At the hearing, applicant also attempted to establish that public convenience and necessity required its service in the coastwise trade. Numerous witnesses representing commercial organizations, shippers, port authorities, and others testified as to the need for applicant's water carrier service. Applicant, however, is unable to procure any vessels to fulfill the present public need for water-carrier service, and any claims as to future public convenience and necessity at least are conjectural."

The petition by the Lykes-Coastwise Line for reconsideration was denied by the whole Commission on July 3, 1944.

In *Erie & St. Lawrence Corp. Contract Carrier Application*, 250 I. C. C. 767, the carrier sought "grandfather" rights as well as rights under the "interim clause" of the Act. The interim operations had to do with coastwise

service along the Atlantic Coast instituted in 1941. It submitted alleged proof of public convenience and necessity to establish present and/or future need for the continuance of such service. The Commission made this finding with respect thereto (p. 779):

> "The coastwise service along the Atlantic coast and the operation between Atlantic and Gulf ports instituted by applicant during 1941, hereinbefore described, have not been a part of the service described in the preceding paragraph. The performance of operations in the past is not in itself sufficient to show that the public convenience and necessity require continuance of such coastal operations to the extent that issuance of permanent authority is justified. The fact that the coastal operations were instituted at about the time of a shortage of larger craft in coastal shipping indicates that the need for applicant's services was a matter of war necessity. If applicant had vessels for such service, temporary authority might be granted under section 311 as amended by the Second War Powers Act, 1942. We will deny the application for such permanent authority."

It would seem that in the instant case the four dissenting Commissioners were fully warranted in the following statement made in the dissenting opinion (R. 19):

> "All of the conditions set forth in the record are abnormal due largely, of course, to the war. Most of the vessels, including those of applicants, formerly used in the transportation of automobiles on the Great Lakes have been converted for, and are being used in, the transportation of other commodities in connection with the war effort. It is indefinite as to how long present conditions will continue or whether applicants will be able to exercise the authority herein granted upon expiration of their existing temporary authority. In my opinion the decision of the majority is based upon too many assumptions and suppositions to be sound as a matter of law."

It is respectfully maintained that the Commission's find-

ing that there will be a need for the particular vessels of the appellant companies in the future, when automobile production for civilian use is resumed, is nothing but speculation.

The Commission has simply projected into the future its finding of a past need for appellant companies' vessels, which finding has no justification in fact except as a finding of a need of a carrying capacity represented by said vessels, without at the same time projecting into the future the past concomitant fact that such carrying capacity was always readily available to appellee companies from sources other than appellant companies. It made no finding that in the past other carrying capacity was not available to the appellee companies, had they not used the vessels of the appellant companies, as on the record of course it could not. It made no finding as to what the future need for automobile carrying capacity might be or how rapidly such need would develop. It made no finding as to whether appellee companies had made any plans to meet the future needs for automobile carrying capacity or as to the sufficiency of such plans to meet future needs. It made no finding that in the future appellee companies could not make available a sufficient carrying capacity without the use of appellant companies' vessels. Yet the determination of each of these matters is a necessary condition precedent to a finding that those vessels will be needed. Contrary to the reasonable import of all the known facts, it simply assumes that appellant companies' vessels will be needed in the future.

3.

Assuming Arguendo that the Commission's Finding Means That Appellant Companies' Presently Owned Vessels Will Be Needed as Automobile Carriers in the Future, Such Finding Would Not Justify an Ultimate Finding That Public Convenience and Necessity Require the Operation of Appellant Companies as Common Carries of Automobiles.

Having found that appellant companies' vessels were needed in the past, and that their operation would be needed in the future, the Commission immediately states the following conclusion (R. 17):

> "Refusal of applicants' right to initiate such operations * * * would according to this record deprive shippers of the necessary transportation facilities, which would not be in the public interest."

On the findings of the Commission, the only justification for this conclusion is the aforesaid finding that appellant companies' vessels will be needed. We have later demonstrated, pages 55-61 of this brief, that the claims of appellants that the Commission found that past service had been inadequate is wholly untenable.

The finding of a future need for appellant companies' vessels does not justify a finding of a future need for their services as common carriers for the following reasons:

A. It ignores the fact that a future need for the vessels may be met as it was in the past, by a chartering of those vessels to one or more of the authorized carriers.

B. The need found is commensurate neither in time nor quantity with the services authorized.

C. The effect of the Commission's action is to grant two "grandfather" rights upon the basis of one prior carrier operation.

D. In basing its finding of a need for the services of appellant companies on a finding of need for the vessels of those companies, the Commission has failed to consider and entirely ignored the effect upon the existing carriers of authorizing new carriers in the field.

We will discuss these reasons in order.

A.

In basing its finding of a future need for the services of the appellant companies on a finding of a future need for the vessels of those companies, the Commission ignores the fact that a future need for the vessels may be met, as in the past, by a chartering of these vessels to one or more of the authorized carriers.

As has been previously noted, the three vessels of appellant companies were chartered and put into operation as automobile carriers by the D. & C. Company as the need for additional carriers developed. They were originally old bulk carriers. Two were converted into automobile carriers and were chartered by the D. & C. Company in 1937 and from year to year thereafter, so long as automobiles for civilian use were being produced. The third vessel was converted from a bulk carrier to an automobile carrier in the spring of 1940 and was chartered by the D. & C. Company and operated as an automobile carrier during the 1940 and 1941 seasons, which was as soon and as long as it was needed for that purpose (R. 122, 161-167, 294-295, 181, 211, 313-315). All of the appellee companies gave evidence of their intention and capacity to supply the future need for automobile transportation when that need developed. They chartered vessels in the past and there is absolutely no reason to suppose they would not in the future should such course appear to be needed. There is not a syllable of evidence in the record to the effect that if the

three vessels are needed as automobile carriers in the future, they would not be chartered by one or more of the appellee companies for that purpose.

McCarthy himself testified that by reason of the small size and obsolescence of the vessels they could not be operated profitably as bulk carriers in normal times (R. 405); hence there would be strong economic reasons compelling their use as automobile carriers on charter if the need for their being so used should develop.

The appellant companies do not need Commission authority to charter the vessels to duly authorized carriers. As stated by Commissioner Miller, three other Commissioners concurring (R. 19):

> "The fact that applicants' vessels were used as they were to carry automobiles prior to the present emergency and may be needed for that service when the production of automobiles is resumed does not warrant the conclusion that there will be need for the *operation of such vessels by applicants as a new carrier in the field.* That will not increase the amount of service formerly provided. *Those vessels may be operated as formerly by existing authorized carriers under charter.* Adequate service has been provided by protestants in the past and there is nothing in the record to show that they will be unable to provide similar service in the future."

Thus if it be assumed that there will be a need for the three specific vessels for the carrying of automobiles in the future, such fact would not justify the finding of the Commission that the appellant companies must be authorized to operate as common carriers in order that the vessels be made so available.

The Commission has itself recognized this to be the case. Thus in *National Barge Co., Contract Carrier Applications,* 250 I. C. C. 806, in dismissing an application for a certificate of convenience and necessity because the ap-

plicant had theretofore engaged in the chartering of its vessels to other carriers, the Commission said, "If there is need for applicant's vessels they are available, as in the past, for charter by the carriers who provide the whole transportation service." See, also, *Bronx Towing Line, Inc., Contract Carrier Application*, 250 I. C. C. 614.

B.

The need found for the vessels is not commensurate either in time or in quantity with the services authorized and can be met by granting appellant companies temporary permits as Congress by section 311(a) of the Act clearly evidenced its intent any such need should be met.

As previously shown, the Commission assumed, without finding, that when automobile production is resumed, the appellee companies will not be able to supply the needs for carriage as rapidly as that need might develop. The assumption is only of a delay, and not of a continuing inability on the part of the appellee companies to meet the predicted need (R. 17-18). Yet to cover this assumed temporary hiatus between the need for and supply of carrying facilities, the Commission has granted to the appellant companies a certificate which permits them to operate as common carriers permanently and without limitation, for once the appellant companies operate under the certificate, their right to continue to operate cannot be terminated.

Furthermore, the Commission found a need for only the three vessels operated by appellant companies, yet the certificate granted constitutes an authorization to the appellant companies to put on not three vessels for which a need was found but an indefinitely greater number of vessels for which no need has been found. Thus, referring to a certificate issued under Section 309(c) of the Act, Section 309(d) provides in part as follows:

> "That no terms, conditions, or limitations shall restrict the right of the carrier to add to its equipment, facilities, or service within the scope of such certificate, as the development of the business and the demands of the public shall require. * * *."

Thus if the certificate is permitted to stand the door is left permanently open for the invasion of the field by a large number of additional vessels, which the record demonstrates has for the most part been largely oversupplied with automobile carrying facilities in the past. This would in all probability result not only in detriment to appellee companies but to the public as well, which is vitally concerned in the conservation of the earning capacity and financial resources of the carriers which serve its needs.

In *Texas & Pac. Ry.* v. *Gulf, C. & S. F. Ry.*, 270 U. S. 266, this Court said (p. 277):

> "It (Congress) recognized that preservation of the earning capacity, and conservation of the financial resources of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as benefit."

It is respectfully maintained that if the wholly unjustified assumption that there will be some delay on the part of the authorized carriers in meeting transportation needs when production of automobiles is resumed be conceded, and if it be further conceded that appellant companies' three vessels would not be chartered to meet such temporary need, nevertheless the Commission would not be warranted, on such grounds alone, in granting to the appellant companies the right to permanently invade the field with an indefinitely great number of vessels. The remedy prescribed would be wholly incompatible with the ailment found.

The need could be met by granting temporary permits to the appellant companies as in the past. Congress expressly provided for such permits in Section 311(a) of the Act, Appendix pp. 73-74). As the Act now stands, the Commission may until December 31, 1945, grant a temporary permit of such duration as it may specify. Assuming that the Second War Powers Act is not further amended, but that after December 31, 1945, the Commission may not grant such a permit for a period to exceed 180 days, such permit should amply cover any peak period in the 1946 shipping season. Any temporary hiatus in the supply of automobile carrying capacity due to the assumed inability of appellees to provide adequate facilities as rapidly as the needs of the manufacturers develop would be completely covered. By providing for such temporary permits and further providing that such permits shall create no presumption that corresponding permanent authority will be granted, Congress clearly manifested its intention that a temporary need for water carrier service should not be made the basis for a permanent certificate under Section 309(c) of the Act. The Commission has plainly disregarded this Congressional intent by issuing a permanent certificate upon the assumption that the existing carriers may not be able to promptly restore carrying facilities as rapidly as the need develops.

C.

The effect of the Commission's action is to grant two "grandfather" rights upon the basis of one prior carrier operation.

The Act requires a finding that the *services* are needed, not that particular equipment or vessels are needed. It was never contemplated by Congress that the owner of a vessel chartered to others and *not operating as a carrier*

should by reason of such ownership and chartering alone be entitled to a certificate of convenience and necessity as a matter of right or it would have so provided when it enacted the so-called "grandfather" provision of the Act, Section 309 (a), giving an applicant in operation as a carrier on January 1, 1940, the right to a certificate of convenience and necessity to continue such operations as a matter of course.

Congress undoubtedly knew that many carriers chartered vessels to use in their service as carriers. It is an old and long established practice.

Now nothing would seem clearer than that carriers would not charter vessels unless they were needed. But the Act is perfectly clear that the owner of a chartered vessel needed in the operation of a common carrier charterer is not entitled to a certificate of convenience and necessity as a matter of course. The owner of the vessel must have been an *operating carrier* on January 1, 1940, in order to obtain a certificate of convenience and necessity as a matter of right.

The Commission's finding that public convenience and necessity require the operation of the appellant companies has nothing more in the nature of fact to support it than that the vessels of the appellant companies were chartered and used by another carrier in the past. If the order of the Commission can be sustained in this case there would seem to be absolutely no reason why any vessel owner whose vessel was chartered by a common carrier in the past might not also obtain a certificate of convenience and necessity to operate in the future by the simple device of having witnesses testify that if the chartered vessels had not been used by the charterer, the remaining vessels of the charterer would not have been sufficient to meet the public needs (a fact which should be easily established since it would seem evident that carriers would not ordin-

arily charter vessels not needed by them in their operations), coupled with a prediction that such vessels will be needed in the future.

It is manifestly one thing to find that particular vessels were or will be needed to serve the public and another thing to find that the operation of the vessels by their owner as a common carrier is needed to serve the public. The finding of the need for the former will not alone justify the finding of the need for the latter. Yet that is exactly what the Commission has done in this case. It based its finding of a need of the services of the appellant companies as common carriers solely on the finding of a future need for the vessels of the appellant companies.

There is no finding by the Commission, and no evidence that would have supported such finding, that the public convenience and necessity would have been in the past or would be in the future better served by the operation of the appellant companies' vessels by the appellant companies rather than by the D. & C. Company, which formerly chartered them, or by any of the other properly certified carriers. There is no other finding which in any way tends to bridge the gap between the finding of a need for the vessels and the finding of a need for the services.

The practical effect of the Commission's order is to grant two "grandfather" rights upon the basis of one prior carrier operation.

Part II of the Interstate Commerce Act deals with common carriers by motor vehicle; Part III with common carriers by water. The provisions of the two parts are quite similar. Part II contains a "grandfather" clause similar to the "grandfather" clause in Part III.

In *Dixie Ohio Exp. Co. Common Carrier Application*, 17 M. C. C. 735, the applicant for a certificate of convenience and necessity under the "grandfather" clause of Part II

based its claim on its operation as a common carrier of motor vehicles, which vehicles were owned and operated by others under the direction of the applicant. In holding that the applicant was a common carrier by reason of such operation, even though the carrying vehicles were owned by others who actually physically operated them, the Commission said (p. 740):

> "If the vehicles of the owner-operators, while being used by the applicant, were operated under its direction and control, and under its responsibility to the general public as well as to the shipper, then its operations, in which such vehicles were employed, come within the phrase 'or by a lease or any other arrangement' of section 203 (a) (14), and applicant, as to such operations, was a common carrier by motor vehicle. The traffic transported in the vehicles of the owner-operators moved under bills of lading issued by applicant. The vehicles, while in applicant's service, were registered under applicant's operating authority and had applicant's name painted, or otherwise shown, thereon. Insurance covering them was arranged and paid for by applicant. Applicant's dispatchers or other employees directed the time and manner of the loading and unloading of the vehicles and also directed their movement over applicant's routes. We conclude that they were operated under applicant's direction and control and under its responsibility to the general public as well as to the shipper, and that applicant, as to its operations in which such vehicles were employed, was a common carrier by motor vehicle as defined in section 203 (a) (14)."

On the authority of the foregoing case the Commission uniformly denied "grandfather" rights to such owner-operators who had operated for common carriers.

In *U. S.* v. *Rosenblum Truck Lines*, 315 U. S. 50, this Court sustained the action of the Interstate Commerce Commission in refusing to grant certificates of convenience and necessity to certain applicants for the operation of

motor vehicles as common carriers. The applicants were the lessors or owners of vehicles which were utilized, operated and controlled by established common carriers by motor vehicle and sought a certificate of convenience and necessity under the "grandfather" clause in Part II. It will be observed that the applicants were in practically the same position as the appellant companies in this case in that they owned and had operated under the supervision and control of the authorized carrier certain motor vehicles which were used by the authorized carrier in the transportation of goods. In fact, they had more to do with the operation of the vehicles which they owned than the appellant companies had to do with the operation of vessels which they owned, for the D. & C. Company, not the appellant companies, operated the chartered vessels (R. 115-120). This Court in holding that the applicants were not entitled to a certificate of convenience and necessity said (p. 54):

> "To hold that appellees, who performed part of that complete transportation service for those common carriers under agreements with them, acquired contract carrier 'grandfather' rights over the same line entitling them also to serve the public is to ascribe to Congress an intent incompatible with its purpose of regulation. The result would be to create in this case two services offering transportation to the public when there had been only one on the 'grandfather' date, without allowing the Commission to determine if the additional service was in the public interest. And, instances can readily be imagined where a single common carrier might utilize the services of several operators such as appellees. Automatically to grant contract carrier rights to such operators might result in such a wholesale distribution of permits as would defeat the very purpose of federal regulation."

The doctrine of that case was reaffirmed by this Court in *Thomson* v. *United States;* 321 U. S. 19, at page 24.

While the Commission does not base its order on the "grandfather" clause of Part III in the instant case, the effect of the order is the same as if it had been granted under that clause. By finding that there was a need for the chartered vessels as the basis, and the only basis, for its finding of a need for the services of the appellant companies, the Commission simply creates two operations where only one previously existed. In so doing the Commission has manifestly taken a position contrary to that taken by it under Part II of the Act dealing with common carriers by motor vehicle.

It has further taken a position contrary to that heretofore taken by it under Part III of the Act dealing with common carriers by water in the case of *National Barge Company Contract Carrier Applications*, 250 I. C. C. 806, *supra*, where in denying an application for a certificate of convenience and necessity it held that if there was a need for the applicant's vessels, they were available, as in the past, for charter by the carriers who provided the whole transportation service.

D.

In basing its finding of a need for the services of appellant companies on a finding of a need for the vessels of those companies, the Commission has failed to consider and entirely ignored the effect upon existing carriers of authorizing new carriers in the field.

The Commission has made a finding of the need for the services of the appellant companies as common carriers in the future, when its report demonstrates that it gave no consideration to the effect upon the rights and property of the duly authorized carriers which have been long operating in the field, when the consideration of such rights is, according to prior decisions of the Commission and to decisions of this Court, a matter of first importance.

This fact amply demonstrates the wisdom of the rule which requires the Commission to make the necessary factual findings to support its ultimate finding. It is only by an adherence to such rule that the courts, which are charged by Congress with the duty of reviewing the validity of the Commission's orders, can intelligently discharge that duty. Here by baldly predicating its ultimate finding of a necessity for the services of the appellant companies as common carriers upon its finding of a need for the operation of their vessels, the Commission demonstrates that it has entirely failed to consider the effect of its order on the carriers which for many years have been affording the public a service in the field. Certainly there is nothing in the Commission's findings to indicate that it gave the slightest consideration to that matter. Of course the Court is not warranted in assuming that it did, otherwise it might just as well assume in every case that the Commission gave proper consideration to all factors involved and entirely dispense with the necessity of findings to show what facts or theories formed the basis of and actuated the Commission's order.

Relative to the principles which govern the determination of whether a certificate of convenience and necessity should issue to a new carrier in the field, the whole Commission in *Philadelphia-Detroit Lines, Inc., Extension—Detroit*, 26 M. C. C. 729, quoting from *Construction by San Antonio & Aransas Pass Ry.*, 111 I. C. C. 483, and from *Texas & N. O. R. R.* v. *Northside Ry.*, 276 U. S. 475, said (p. 733):

> "The question, in substance, is whether the new operation or service will serve a useful public service, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines or carriers; and whether it can be served by applicant with the new operation or service proposed without

endangering or impairing the operation of existing carriers contrary to the public interest."

The following statement from *C. & D. Oil Co. Contract Carrier Application*, 1 M. C. C. 329, is peculiarly applicable to the present situation (p. 332):

> "We think that, in order to foster sound economic conditions in the motor-carrier industry, existing motor carriers should normally be accorded the right to transport all traffic which they can handle adequately, efficiently, and economically in the territories served by them, as against any person now seeking to enter the field of motor-carrier transportation in circumstances such as are here disclosed. It will be noted that applicants do not propose a service which is in any way particularly adapted to the requirements of the shipper or consignee, or in fact which differs in any way from the service now performed in this traffic."

The above statement was quoted and its principles followed in *Carr Contract Carrier Application*, 2 M. C. C. 263, 269.

Relative to this same subject, the Court in *Texas & Pac. Ry.* v. *Gulf, etc., Ry.*, 270 U. S. 266, said (p. 277):

> "It (Congress) recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit * * *."

In *Texas & N. O. R. R.* v. *Northside Ry.*, 276 U. S. 475, the court said (p. 479):

> "The purpose of paragraphs 18 to 22 is to prevent interstate carriers from weakening themselves by constructing or operating superfluous lines, and to protect

them from being weakened by another carrier's operating in interstate commerce a competing line not required in the public interest."

In accord therewith see *N. Y. Central Securities Co.* v. *U. S.*, 287 U. S. 12, at page 25.

In the case at bar the court below said (R. 82):

"The court is also aware of the basic purpose of the Transportation Act of 1920, in that 'it recognized that preservation of the earning capacity and conservation of the financial resources of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources, and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit • • •. *Texas & Pacific R. R. Co.* v. *Gulf, Colorado and Santa Fe R. R. Co.*, 270 U. S. 266, 277, also *Texas & New Orleans R. R. Co.* v. *North Side Belt R. R. Co.*, 276 U. S. 475, 479'."

The effect of the Commission's finding and order is to introduce new and competing carriers into the field of the transportation of automobiles on the Great Lakes and to dilute the available traffic which in the past has been adequately handled by carriers already in the field.

Regulation of public utilities is based on the theory of regulated monopoly, rather than competition, and before a new utility can be allowed to enter the field and take any business from another, a definite need for the *services* of such additional utility should be shown. Congress has specifically required the Commission to find a need for such services.

As previously demonstrated, the Nicholson Universal Steamship Company had a very large unused automobile carrying capacity in 1940, one of the best years for automo-

bile traffic in a number of years preceding 1941. The record further shows that even though the year 1937 ranked first in automobile production in the decade of the 1930's, the Nicholson Company found that the demand for automobile carriers did not warrant the retention of certain of their vessels exclusively for that purpose and they were converted to bulk carriers (R. 549-550). As already demonstrated, the D. & C. Company put on automobile carrying vessels whenever and as fast as the need therefor developed.

The record is totally barren of any showing that the existing carriers did not supply adequate automobile carrying facilities at all times in the past. It shows that in every year there was unused automobile carrying capacity held by the operating carriers except during the peak of the 1941 and possibly the peak of the 1940 seasons.

There is a total lack of evidence in the record to justify the entry of new carriers in the field. The existing common carriers have been in the automobile carrying field for many years. Their investment in automobile carrying facilities is entitled to some consideration and protection. On the other hand, the appellant companies, when the opportunity was open to them, did not engage as common carriers of automobiles and assume the risks and burdens incident thereto. They preferred to charter their vessels to an existing carrier which did assume such risks and burdens.

As previously shown, the three appellee companies offered uncontradicted evidence that they intended to continue in the automobile carrying business and to use every effort to provide adequate automobile carrying facilities as and when the need therefor should develop in the future. If the future should develop a need for the automobile carrying capacity of the appellant companies' vessels there

is no reason to suppose those vessels could not be chartered to and used by the existing duly authorized carriers. There was no showing or attempt to show that the operation of the appellant companies' vessels would be more satisfactorily conducted from the standpoint of the public by the appellant companies than by the present carriers. There was no showing or attempt to show that the operation of the appellant companies' vessels by the D. & C. Company was less efficient or less satisfactory from the public standpoint than would have been the operation by the appellant companies themselves.

It is respectfully maintained that the patent failure of the Commission to make any reference to the effect its order might have upon the presently duly authorized carriers demonstrates that the order was made without consideration of one of the most vital problems which the Commission under the law is required to concern itself with before admitting additional carriers to the field.

III.

ANSWERING CERTAIN ARGUMENTS OF APPELLANTS.

The first matter to be noticed in connection with the briefs filed on behalf of appellants is that in both briefs the effort is made to sustain the Commission's order, not on the basis of the Commission's basic findings of fact, but on the basis of what appellant companies contend is shown by the evidence in the record and what the Commission contends is disclosed by the report.

This effort is of course made necessary because the basic findings of the Commission will not, as above demonstrated, support its ultimate finding and consequent order.

Thus the second proposition in appellant companies' brief is:

"The Commission was justified in its conclusion on the question of public convenience and necessity as this conclusion could reasonably be reached on the evidence of record." (Brief, p. 24.)

The Commission's brief varies from this proposition slightly by claiming that the order has "a rational basis as disclosed by its report." (Brief, p. 36.)

Both of these propositions are tantamount to a confession that the Commission's *findings* do not support its order and neither proposition is sound in law. We have previously quoted from the authorities establishing the principle that the ultimate finding of future convenience and necessity must be supported by basic findings of fact, and if not so supported cannot be sustained.

In addition to those authorities we cite the following as being particularly pertinent here.

In *Atchison Ry.* v. *United States*, 295 U. S. 193, this Court, in setting aside an order of the Commission, said (pp. 201-202):

> "*Its report does not disclose the basic facts* on which it made the challenged order. This court will not search the record to ascertain whether, by use of what there may be found, *general and ambiguous statements in the report* intended to serve as findings may by construction be given a meaning sufficiently definite and certain to constitute a valid basis for the order. *In the absence of a finding of essential basic facts, the order cannot be sustained. Florida* v. *United States*, 282 U. S. 194, 215. Recently *this court has repelled the suggestion that lack of express finding by an administrative agency may be supplied by implication. Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 433.

In *United States* v. *B. & O. R. Co.*, 293 U. S. 454, this Court said (pp. 463-464):

> "The primary question of fact presented for de-

termination was, as the report of the Commission states, 'whether the use of locomotives equipped with hand reverse gear, as compared with power reverse gear, causes unnecessary peril to life or limb.' The report discusses, at some length, the alleged advantages and disadvantages of the two classes of reverse gear and the expense which the proposed change would entail; and concludes with 'findings' that, to a certain extent, the change should be made. But whether the use of any or all types of steam-locomotives 'equipped with hand reverse gear as compared with power reverse gear causes unnecessary peril to life or limb,' *is left entirely to inference.* This complete absence of *'the basic or essential findings* required to support the Commission's order' renders it void."

In *Interstate Commerce Commission* v. *Chicago, Burlington and Quincy Railroad Co.*, 186 U. S. 320, the Court said (pp. 341-343):

"Being then constrained to the conclusion that the order of the Commission was not sustained by the *facts upon which it was predicated*, we cannot enter into an independent investigation of the facts, even if it be conceded the record is in a condition to enable us to do so, *in order that new and substantive findings of fact may be evolved, upon which the order of the Commission may be sustained. Louisville &c. R. R. Co.* v. *Behlmer*, 175 U. S. 648-675."

Thus this Court has definitely held that where the findings do not support the order it will not search the record to see whether new findings might be evolved which would sustain the order. It will not search the record to ascertain whether general and ambiguous statements intended to serve as findings may be made sufficiently definite and certain to constitute a valid basis for the order. It will not treat as a finding a discussion of a subject in the report by which the finding is left to inference. It will not supply a finding by implication.

Manifestly the foregoing cases are eminently sound. It is the function of the Commission to make the findings necessary to sustain its order. It is the function of the Court to determine whether the findings are sustained by substantial evidence, and if so, whether they sustain the order. It is not the function of the Court to make findings, for should the Court make a finding which it conceived the evidence would support, it cannot know if the Commission would have made the finding, if in fact it did not make it. Furthermore, in such case the Court would be invading the field left to the Commission, unless perchance the finding was such as, in the opinion of the Court, the Commission could not on the record fail to make.

Substantial portions of the briefs of both the appellant companies and of the Commission consist of a search of the record and the advancement of reasons which it is conceived might, in the mind of the Commission have substantiated its ultimate finding of convenience and necessity. This is, of course, a perfectly futile endeavor. The failure of the Commission to make the necessary findings cannot be so remedied. In the absence of findings it cannot be determined on what consideration the Commission acted. It has been demonstrated that there is a lack of findings to sustain the order of the Commission.

One or two points in appellants' briefs warrant further consideration.

1.

The Commission made no finding that the service rendered by appellees in the past was inadequate.

It is contended by appellants in effect that the Commission found the service rendered by appellees in part inadequate, and that this finding is sufficient to support the Commission's order. (Appellant companies' brief, p. 27:

Commission's brief, p. 46.). We quote from the report of the Commission all references therein which can be considered as having any bearing on the so-called inadequacy of the service.

The Commission said (R. 14):

> "One of the automobile manufacturers was subjected to delays in the transportation of motor vehicles by water during 1941 from Detroit to Lake Superior ports."

Further on in the report it said (R. 14):

> "Prior to the war, the peak period for the movement of automobiles on the Great Lakes commenced in September or early October, with the production of new models. In 1940 and 1941, there were delays ranging from 2 to 4 days in the loading of the automobiles from the docks at Detroit incident to the congestion of such traffic and the inability of the water carriers to handle it promptly, which caused delays in delivery at final destination and resulted in numerous complaints from automobile dealers and distributors. Because of such delays, it was necessary at times to move by motortruck automobiles which had been previously delivered to the docks at Detroit for water transportation."

Again it said (R. 15):

> "At the further hearing, it showed through representatives of two dealers in certain makes of automobiles and trucks manufactured prior to 1942 by the Chrysler Corporation, that these dealers received shipments of motor vehicles by water at Cleveland in 1941, most of which were handled by this protestant; that they experienced no delays to such shipments, and that the service was satisfactory."

And finally (R. 17):

> "At certain times during the period prior to 1942, there were insufficient vessels, including applicants' vessels, fully to meet the needs of shippers of motor vehicles and similar situations may likely arise at

such times in the future after the war upon the resumption of normal production of motor vehicles."

Now, while mentioning some delays in loading at Detroit, it should be noted that the only ports of delivery which the Commission mentioned as involved in delay were the Lake Superior ports where it says one manufacturer was subjected to delay in 1941. On the other hand, the Commission mentions the testimony to the effect that deliveries made to Cleveland in 1941 were not subjected to delay and that the service was satisfactory. Obviously referring to the peak season, which "commenced in September or early October," the Commission mentions delays in loading at the docks in Detroit ranging from 2 to 4 days.

Representatives of three automobile companies were called as witnesses of appellants, who testified that if appellant companies' vessels had not been in operation in 1941, the remaining vessels in the service could not have taken care of the traffic.

The representative of the Ford Company did not testify as to any delays in either 1940 or 1941 (R. 220-223). The representatives of the Chrysler, Hudson and Pontiac companies testified as to some delay at the peak of the 1941 season (R. 227, 230, 237-238, 434) but none testified to any delay in 1940. Witnesses representing drive-away companies, driving cars away from the docks at Buffalo and Cleveland, testified to some delay in 1940 and 1941, some without specifying the time of the delay, others specifying the delay as at the peak of the 1941 season (R. 246, 262, 269, 271). One mentioned a delay in 1940 due to weather conditions (R. 262); one said the delay was not wholly attributable to the shipping companies; "it was during the peak load that comes upon all carriers in business at times" (R. 271). This same witness also testified

that on one occasion, in November 1941, he picked up some automobiles at the docks in Detroit and took them to Cleveland. He attributed this in part to weather conditions (R. 268-270). This was the only testimony as to diversion of traffic. At one time in 1941 so many cars were put on the docks at Buffalo that the drive-away company could not take care of them and some were sent by rail from there (R. 272). One, and only one, witness, who was from a drive-away company, testified that there was a delay of "from two or three or four days" in getting cars from the dock at Detroit down to Buffalo (R. 254).

Since none of the representatives of the automobile companies testified to any delay at the docks in 1940, it is fairly evident they did not consider there was any such delay. The time of the delay, when fixed by the witnesses, was at the peak of the 1941 season, in October or November. There was a very sharp peak in traffic in 1940, beginning the latter part of October and ending in November (R. 597-598) but with this very sharp peak the record does not show any complaint of the manufacturers as to that year.

The most that the foregoing testimony, which was all the testimony on the subject of delay, would justify in the way of a finding is that there was some little delay at the peak of the season in 1941. The record is clear that 1941 was the heaviest year of automobile traffic since the 1920's, 1937 being the second heaviest year (R. 549-550, 321, 594).

Referring to the testimony of all the foregoing witnesses of the automobile manufacturers and of the drive-away companies, the Commission said (R. 14):

> "*In substance*, it is that applicants' vessels were essential to the transportation of automobiles from Detroit to Lake Erie ports in the past; that it would not have been possible without them for the water carrier to have handled the automobiles offered for transportation in 1940 and 1941 and that they will again

be needed when normal production of motor vehicles is resumed. Similar testimony was offered on behalf of motor common carriers which handle from Buffalo to Eastern destinations automobiles transported by water to that point over the Great Lakes."

The Commission characterized the testimony *in substance* as being testimony that appellant companies' vessels were needed in the past and that they will be needed in the future. Manifestly that in substance was all it was. Had the Commission considered it was testimony establishing inadequacy of past service, it would not have so limited the above summary of it, and would have made some statement to the effect that it at least indicated inadequacy of past service. In view of the facts as above shown, regarding the testimony, the reason why the Commission did not find that the services supplied by the existing carriers in the past was inadequate is manifest.

The testimony was offered for the purpose of establishing a need for appellant companies' vessels, and the Commission used it as the basis of its finding as to that need and as the basis of no other findings. Of course, as already demonstrated, the need established was only for a carrying capacity represented by the vessels but this does not change the fact that the Commission used it only for the purpose of establishing a need for the vessels.

The dissenting members of the Commission stated:

"Adequate service has been provided by protestants in the past." (R. 19.)

Had the majority of the Commission been inclined to disagree with the minority on this point they would have undoubtedly said so. The Commissioner who dissented from the report of Division IV did not state that there had been any inadequacy in the past service. The Commission itself has recognized that the adequacy of a service is

not to be determined by contingencies which may arise during peak periods of traffic. Thus in *Cater's Motor Freight System, Inc., Extension—Wenatchee*, 40 M. C. C. 292, the Commission said (p. 294):

> "While we recognize the desirability of motor carriers making every effort to supply for the public a sufficient amount of equipment to take care of every reasonable demand, we must also acknowledge that large financial investments are required if there is to be sufficient equipment to take care of the maximum demand that can arise under the circumstances of peak movements. On the other hand, if we were to authorize this applicant to enter the field, it would create no new business but would serve only to further divide the existing business during the entire period of movement. Public convenience and necessity refer to a demand that is reasonably constant and determinable rather than to the extraordinary peaks that may rise in the course of any business."

It is respectfully maintained that the Commission made no finding of inadequacy in past services. Whether it could have made such finding is immaterial in this suit since this Court has repeatedly said it will not make findings for the Commission nor search the record to determine if an ambiguous treatment of a subject might be considered as a finding.

It was the view of the court below that the Commission had made no finding as to inadequacy of service, for it said (R. 88):

> "Whether it is economical and in the public interest to expect or require water carriers to maintain, throughout the navigation season, the carrying capacity needed for the peak load in September or early October, we have no occasion to inquire, and the answer is within the competency and, if upon evidence, within the exclusive prerogative of the Commission.
>
> • • •
>
> "The effect of the Commission's finding and order

is to introduce new and competing carriers into *a field adequately served*, without the definite need for the services being shown, and this collides with the clearly defined purpose of the Transportation Act already indicated.''

The court definitely recognized that the Commission, if acting on evidence, had power to determine whether it was economical and in the public interest to require water carriers to maintain throughout the navigation season the carrying capacity needed for the season's peak. It would not have felt at liberty to state, as it did, that the field had been adequately served in the past, if the Commission had made a finding to the contrary, without at least examining the evidence and stating that there was no substantial support in the evidence for the finding. The contention of appellants that the court usurped the function of the Commission in stating that the past services had been adequate when the Commission had taken the contrary view is wholly unwarranted. (Appellant companies' brief, pp. 21-22; Commission's brief, p. 48.) There was no finding that past services were inadequate nor was there any finding that the carriers serving the field must be constantly prepared to meet, without any delay, the demands of the peak of the season. Appellants assume findings not made and then charge the court with a failure to observe them.

2.

Appellants err in their claim that the court below held that it is the policy of the Act to forbid any new competition in a field which has been adequately served.

It is contended by appellants that the court below took the position that it is the policy of the Interstate Commerce Act to forbid new competition in any field which has been

adequately served by the existing carriers, and that in so doing the court too narrowly construed the Act. (Commission's brief, pp. 20, 28-36; Appellant companies' brief, pp. 22-24.)

Appellants have misconstrued the court's position. What the court said is this (R. 88):

> "The effect of the Commission's finding and order is to introduce new and competing carriers into a field adequately served, *without the definite need for the services being shown*, and this collides with the clearly defined purpose of the Transportation Act already indicated."

The court said that the field had been adequately served in the past, and that the Commission, without a definite need for their services being shown, had introduced new and competitive carriers in the field. The court did not say that a need for new and competing carriers in the field could not be shown in any case where the past service had been adequate; it said that such need had not been shown in this case. Appellees contended in the court below, as they contend here, that whatever may be said as to the soundness, on the record, of the Commission's findings as to a need for appellant companies' vessels, those findings alone were not sufficient to show a need for the services of appellant companies as new and competing carriers in the field. It was contended that there were no findings showing a need for the services of appellant companies. The court below took that view and stated that the service had been adequate in the past, and that the Commission acted in contravention of the Act when it admitted new carriers into the field without a definite need for the service being shown.

This goes back to the oft-repeated statement of this Court that the Commission's orders must be supported by adequate basic findings of fact. Such findings were clearly

missing in the instant case, hence the position of the court below. There were no findings showing the need for the appellant companies' services as carriers in the field.

Whether any findings, other than findings of inadequacy of past service, would justify the admission of new and competing carriers into the field, we do not have to consider here, since there were no other such findings. It might be well to note, however, that in the case of *Interstate Commerce Commission* v. *Parker*, 65 S. Ct. 1490, it is rather strongly indicated that, except possibly in very unusual circumstances, a finding of inadequacy of past service would be required. In that case the majority of the Court sustained the issuance of a certificate of convenience and necessity to a common carrier by motor, a subsidiary of the Pennsylvania Railroad Company, to operate on routes parallel to certain lines of that railroad company for the purpose of affording a service coordinated with that offered by the railroad company and different in nature from that offered by the motor carriers in the field. The majority of this Court said (p. 1495):

> "The contention of appellees, protestant motor carriers, is that since no evidence was offered as to the inadequacy of the presently duly certificated motor carriers to serve the railroad's need, there was a failure of proof as to convenience of and necessity for a new motor truck operation in the territory. • • • Since, however, on adequate evidence the Commission found that the motor service sought was of a *different character* from the existing motor service *and not directly competitive or unduly prejudicial to the already certificated motor carriers*, 42 M. C. C. 725, 726, we hold that the Commission had statutory authority and administrative discretion to order the certificate to issue."

Mr. Justice Black and Mr. Justice Rutledge concurred in a dissenting opinion of Mr. Justice Douglas who dis-

agreed with the majority opinion upon the ground that as a matter of fact the services which the newly certificated motor carrier was authorized to render were not sufficiently different in kind from that rendered by the other motor carriers in the field to justify the Court in sustaining the Commission's action. In the course of his opinion Mr. Justice Douglas said (p. 1497):

> "I can find in the Act no indication whatsoever that railroad applicants for a motor vehicle certificate are to be considered any more favorably than any other type of applicant. Yet it is plain that this decision permits just that. For if any applicant other than a railroad affiliate were before the Commission with an application for a certificate to serve this precise territory, *it would have to show that existing transportation facilities were inadequate to serve the needs of the public efficiently.*"

The implication of the majority opinion would seem to be in accord with the foregoing statement, since the certification was justified upon the ground that the service to be rendered was different in kind from that of other carriers in the field. Had the service been the same in kind, the adequacy of past service of existing carriers would have seemed to be a bar to the certification of a new carrier in the field.

It should also be noted that the majority opinion mentions the fact that the Commission had found upon adequate evidence that the service sought would not be "directly competitive or unduly prejudicial to the already certificated motor carrier."

In the instant case, if the certification stands, the appellants will be in direct competition with the presently certificated carriers, and, as already pointed out, there is not the slightest evidence that the Commission even considered the effect of its action on the carriers already

in the field, and this in face of the fact that the record clearly demonstrates that for the most part the field has been largely over-supplied with automobile carrying facilities in the past.

Inasmuch as each of appellees' briefs has gone outside the record to inform this court that appellee, Great Lakes Transit Corporation, has sold its last four vessels and is now without ships, it is believed that said appellee will be indulged by this court if it similarly departs from the record, on its own behalf alone, and not for any other appellee, in order to reveal the entire situation. Great Lakes Transit Corporation, on May 23, 1945, entered into a contract to sell said vessels to a Chilean buyer, by the terms of which those obsolete vessels are to be rehabilitated and fitted out for salt water service, the expense of which work is to be paid out of the purchase price, which was increased for that purpose. The purchase price to be received this fall will be deposited in a construction reserve fund, pursuant to the Merchant Marine Act of 1936, as amended, 46 U. S. C. 1161(b)(c), so that if and when the fund is used for the construction or purchase of other ships, the income tax which normally would arise upon the profit to be made in the transaction will be avoided. The establishment of such a fund was authorized by the Executive Committee of the Board of Directors of Great Lakes Transit Corporation on May 29, 1945. This certificated appellee has not abandoned its intention of continuing in the shipping trade.

CONCLUSION.

In conclusion we think this case may be adequately summed up as follows:

1. The Commission made a finding that the services of the appellant companies' three vessels were needed in the

past. This finding is an ambiguous finding and all that the evidence will justify in respect to it is that there was a past need for the carrying capacity represented by the three vessels of the appellant companies. The record shows by uncontradicted evidence that had the three vessels of the appellant companies not been available in the past, other vessels could readily have been obtained to replace their carrying capacity.

2. The Commission found that there will be a need for the appellant companies' vessels in the future when the production of automobiles for civilian use is resumed. The finding of this need is based upon the ambiguous finding that there was a past need for the appellant companies' vessels, plus a prediction or speculation that when production of automobiles is resumed there will be a need for as great a carrying capacity for automobiles as there was in the year 1941. Coupled with this prediction is the assumption that the need for automobile carrying capacity will develop more rapidly than boats can again be made available for the transportation of automobiles. When it is considered that after the first World War there was a vast amount of unused shipping tonnage on the Great Lakes, with the result that great numbers of ships were sold for scrap iron, and that the shipping tonnage produced during the war just ended was far greater than that produced during the first World War, and that ships can be converted into automobile carriers within two or three months' time, it is manifest that the assumption is a violent one.

The keystone of the finding of the Commission of a future need for appellant companies' vessels is its assumption that automobile manufacture will be restored after the war to the point of creating a demand for lake transportation before the traditional automobile carrying fleets will again be able to handle the traffic. That assumption

is barren of any justification of record. There was no testimony as to when either of those operations will be resumed. The appellee carriers testified that they were uncertain as to when their operations would again be normal, and the representatives of the automobile manufacturers positively testified that they did not know when production of automobiles would again reach the point of requiring water carriage, yet the Commission assumed that the latter would antedate the former. Such a conclusion is not only not supported by substantial evidence, it is not supported by any evidence and is therefore conjectural, speculative, arbitrary and capricious.

3. Having found that there will be a need for the vessels of the appellant companies when the production of automobiles is resumed, the Commission found from this "need" that the *service* of the appellant companies as common carriers will be needed. The gap between the finding of a future need for the vessels and of a finding for the future need of the services of the appellant companies is unbridgeable. Whatever need there was for the appellant companies' vessels in the past was satisfied through a charter of those vessels to the D. & C. Company. A certificate of convenience and necessity is not needed to permit the appellant companies to charter them to one of the authorized carriers in the future. All three of the appellee companies offered evidence of their intention to supply adequate automobile carrying capacity in the future. If the vessels of the appellant companies have been then reconverted to automobile carriers, there is no reason to suppose that they cannot be chartered to some of the presently authorized carriers if need for that should develop. By finding a future need for the appellant companies' three vessels, and as a result thereof finding a need for the services of the appellant companies as carriers and granting to them a certificate of con-

venience and necessity, the Commission has opened the door for the appellant companies to put on, not three additional vessels for which a need to fill an assumed temporary hiatus in the supply of automobile carriers has been found, but an indefinitely greater number of vessels for a time indefinitely long for which no need has been found. If the order of the Commission is permitted to stand, it cannot be revoked in the future, but the door is left permanently open for the invasion of the field by a large number of additional vessels when the record demonstrates that the field has for the most part been largely oversupplied with automobile carrying facilities in the past. This will result not only in detriment to the appellees but to the public as well, which is vitally concerned with the conservation of the earning capacity and financial resources of the carriers which serve its needs.

4. The Commission has found a need for the services of the appellant companies as common carriers in the future without any finding that the service rendered by the duly authorized carriers has been inadequate in the past and when the record demonstrates a large oversupply of automobile carrying vessels during the entire decade of the 1930's.

5. The Commission has made a finding of the need for the services of the appellant companies as common carriers in the future, when its report demonstrates that it gave no consideration to the effect upon the rights and property of the duly authorized carriers which have been long operating in the field, when the consideration of such rights is, according to prior decisions of the Commission and to decisions of this Court, a matter of first importance.

6. Although the appellant companies possess temporary operating rights which may be easily extended, if needed, until normal conditions are restored, the Com-

mission has seen fit forthwith to grant them permanent rights, stating that it would be placing an undue burden on them to compel them to renew their application and present their evidence at a later date (R. 18). Thus the Commission has let the convenience of the appellant companies outweigh the importance to the existing and long established carriers and to the public of having the question of whether future convenience and necessity require their operation as common carriers determined at a time when many of the important considerations involved are not, as when the order was entered, the subject of conjecture and speculation, but can be reasonably weighed and determined in the light of existing facts and circumstances susceptible of definite proof. Such mere convenience of a party can never be a justification for action which may result in permanent and irremediable injury to both the established carriers and the public.

It is respectfully submitted that the judgment of the court below is correct and should be affirmed.

Respectfully submitted,

ANGELL, TURNER, DYER & MEEK,
2104 Dime Building,
Detroit 26, Michigan;

MAYER, MEYER, AUSTRIAN & PLATT,
231 South La Salle Street,
Chicago 4, Illinois,

POPE & BALLARD,
120 South La Salle Street,
Chicago 3, Illinois,
Of Counsel.

JAMES TURNER,
WILLIS C. BULLARD,
2104 Dime Building,
Detroit 26, Michigan,
S. S. EISEN,
140 Cedar Street,
New York 6, New York.
ISAAC H. MAYER,
CARL MEYER,
231 South La Salle Street,
Chicago 4, Illinois,
ERNEST S. BALLARD,
120 South La Salle Street,
Chicago 3, Illinois,
Attorneys for Appellees.

October 2, 1945.

APPENDIX.

The Transportation Act of 1940, 54 Stat. 899, inserts before Part I of the Interstate Commerce Act the following declaration of National Transportation Policy:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 309 of Part III of the Interstate Commerce Act, as enacted by the Transportation Act of 1940, 54 Stat. 941, 49 U. S. C. A., Section 909, provides in part as follows:

> "(a) Except as otherwise provided in this section and section 311, no common carrier by water shall engage in transportation subject to this part unless it holds a certificate of public convenience and necessity issued by the Commission: *Provided, however,*

That, subject to section 310, if any such carrier or a predecessor in interest was in bona fide operation as a common carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if applications for such certificate is made to the Commission as provided in subsection (b) of this section and prior to the expiration of one hundred and twenty days after this section takes effect. * * *

"(b) Application for a certificate shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulations, require.

"(c) Subject to section 310,* upon application as provided in this section the Commission shall issue a certificate to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if the Commission finds that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the pro-

* Section 310 provides that no person shall hold both a certificate of convenience and necessity for operation as a common carrier by water and a permit of convenience and necessity for operation as a contract carrier by water unless the Commission finds, for good cause shown, that both a certificate and a permit may be so held consistently with the public interest and with the national transportation policy declared in the Act.

posed service, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied.

"(d) Such certificate shall specify the route or routes over which, or the ports to and from which, such carrier is authorized to operate, and, at the time of issuance and from time to time thereafter, there shall be attached to the exercise of the privileges granted by such certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such other terms, and conditions, and limitations as are necessary to carry out, with respect to the operations of the carrier, the requirements of this part or those established by the Commission pursuant thereto: *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to its equipment, facilities, or service within the scope of such certificate, as the development of the business and the demands of the public shall require, or the right of the carrier to extend its services over uncompleted portions of waterway projects now or hereafter authorized by Congress, over the completed portions of which it already operates, as soon as such uncompleted portions are open for navigation.

"(e) No certificate issued under this part shall confer any proprietary or exclusive right or rights in the use of public waterways."

Section 311 of said Part III, 49 U. S. C. A., Section 911, provides in part as follows:

"(a) To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such a need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier by water or a contract car-

rier by water, as the case may be. Such temporary authority shall be valid for such time as the Commission shall specify (but for not more than an aggregate of one hundred and eighty days),* and shall create no presumption that corresponding permanent authority will be granted thereafter."

The *Merchants Marine Act of 1936, as amended*, 51 Stat. 157, 46 U. S. C. 1161, provides, in part, as follows:

"(b) For the purposes of promoting the construction of vessels necessary to carrying out the policy set forth in section 1101 of this title, any citizen of the United States who is operating a vessel or vessels in the foreign or domestic commerce of the United States or in the fisheries or owns in whole or in part a vessel or vessels being so operated, or who, at the time of purchase or requisition of the vessel by the Government, was operating a vessel or vessels so engaged or owned in whole or in part a vessel or vessels being so operated or had acquired or was having constructed a vessel or vessels for the purpose of operation in such commerce or in the fisheries, may establish a construction reserve fund, for the construction or acquisition of new vessels, to be composed of deposits of proceeds from sales of vessels, indemnities on account of losses of vessels, earnings from the operation of vessels, and receipts, in the form of interest or otherwise, with respect to amounts previously deposited. Such construction reserve fund shall be established, maintained, expended, and used in accordance with the provisions of this section and rules of regulations to be prescribed jointly by the Commission and the Secretary of the Treasury.

"(c) In the case of the sale or actual or constructive total loss of a vessel, if the taxpayer deposits an

* The parenthetical language was struck out of the above section by the Second War Powers Act of March 27, 1942, but was restored as of December 31, 1945, pursuant to the provisions of said Act as amended December 20, 1944. See Appendix to Title 50, U. S. C. A., War, Sections 631 b and 645, and Laws of 78th Congress, second session, Chapter 614, Public Law 509.

amount equal to the net proceeds of the sale or to the net indemnity with respect to the loss in a construction reserve fund established under subsection (b), then, if the taxpayer so elects in his income-tax return for the taxable year in which the gain was realized, no gain shall be recognized to the taxpayer in respect of such sale or indemnification in the computation of net income for the purposes of Federal income or excess profits taxes. * * *"

SUPREME COURT OF THE UNITED STATES.

No. 22.—October Term, 1945.

The United States of America, Interstate Commerce Commission, T. J. McCarthy Steamship Company and Automotive Trades Steamship Company, Appellants,

vs.

Detroit and Cleveland Navigation Company, Great Lakes Transit Company and Nicholson Universal Steamship Company.

Appeal from the District Court of the United States for the Eastern District of Michigan.

[November 5, 1945]

Mr. Justice Douglas delivered the opinion of the Court.

The Interstate Commerce Commission pursuant to § 309(e) of Part III of the Interstate Commerce Act (54 Stat. 941, 49 U. S. C. § 909(e)) granted to T. J. McCarthy Steamship Co. and Automotive Trades Steamship Co. (whom we will call the applicants) a certificate of convenience and necessity to operate as common carriers in the transportation by water of motor vehicles from Detroit, Michigan to ports on Lake Erie and Lake Superior.[1] 260 I. C. C. 175. The appellees, who were protestants in the proceeding before the Commission and who are common carriers of motor vehicles by vessels on the Great Lakes, challenged that order before a district court of three judges. That court set aside the Commission's order. 57 F. Supp. 81. The case is here on appeal.[2]

World War II caused the cessation of the production of motor vehicles for civilian use. Prior to that time appellees as common carriers had transported motor vehicles by vessels from Detroit to various ports on the Great Lakes. The applicants owned three vessels equipped as automobile carriers. These vessels were

[1] The companies are both controlled by T. J. McCarthy. The certificate runs to T. J. McCarthy Steamship Co., for itself and as managing agent of Automotive Trades Steamship Co.

[2] Sec. 210 (28 U. S. C. § 47a) and § 238 of the Judicial Code as amended, 28 U. S. C. § 345.

used extensively prior to the war in transporting automobiles from Detroit to Lake Erie ports. They were for the most part under charter to one of the appellees from 1936 through 1941. With the advent of the war the United States requisitioned many of the vessels of the appellees, using some of them for carrying bulk commodities on the Great Lakes and removing others to the salt water. As a result, two of the appellees at the time of the hearing[3] in June, 1943, had no automobile carriers and were not operating; the third was operating nine vessels of which five were owned by and operated for the United States. In contrast, the applicants owned their three vessels free and clear of any incumbrance; and while those vessels had been converted for carrying bulk traffic, all of the equipment necessary for reconversion into automobile carriers had been preserved. The Commission found that prior to the war there were insufficient facilities for the movement of automobiles on the Great Lakes during certain peak periods even with the carrying capacity of applicant's vessels included. There was testimony of automobile manufacturers and of motor common carriers that the carrying capacity of applicants' vessels would be needed when the manufacture of automobiles was resumed. The Commission found that prior to the war there was a definite need for the carrying capacity of applicants' vessels in this transportation and that there was a reasonable certainty that a like need for that capacity would arise when the production of automobiles for civilian use was resumed. It found that while the applicants could readily reconvert their vessels to handle automobile traffic, there was considerable uncertainty as to the length of time it would take the appellees to procure and place in operation the additional vessels which would be needed when production of automobiles for civilian use was resumed. It concluded that the public interest would be adversely affected if, after production was resumed, appellees were delayed in acquiring the additional facilities needed to meet the transportation demands. On that basis it held that the proposed service would be required by future public convenience and necessity.

The District Court held that the Commission's order could not be sustained in absence of evidence that applicants' vessels were the only vessels available to appellees to meet the prospective transportation demands beyond that furnished by their own ves-

[3] The Commission rendered its decision on March 7, 1944.

sels. It concluded that not only was there no finding that if applicants' vessels were not chartered there was no other carrying capacity which could have been acquired but that the record established the contrary.

The case, however, is not one where there is a service presently being rendered and a newcomer seeks entry into the field. Whether in that event the ruling of the District Court would be correct is a question we do not reach. While the authority of appellees to serve as carriers has not been terminated, the service formerly rendered by them has been interrupted by the war. The applications concern a proposed additional service to be rendered in the future. Sec. 309(c) authorizes the Commission to permit the proposed service to be rendered if it "is or will be required by the present or future public convenience and necessity." That entails a prophecy so far as future requirements are concerned. The Commission made that prophecy on the basis of (1) the earlier service which had been discontinued during the war, (2) the likely requirements for the future, and (3) the ability of the existing carriers to effect an expeditious resumption of service at the war's end. The ability of the applicants promptly to render the service at that time is adequately established. Whether the appellees could or would move with like dispatch is less certain. Many of the vessels which they previously owned had been taken by the United States. And the Commission had doubt as to whether they would or could obtain the necessary additional transportation facilities in time to meet the foreseeable future demands which would arise when automobile manufacture was resumed. We do not have here a case where there was a surplus of facilities in the prior service which the war interrupted. The Commission indeed found that the prior service had not been adequate, a finding which we think is supported by evidence. It took that fact into consideration in determining the margin of safety which the public interest required for the resumption of the interrupted service. We think the inadequacy of the prior service was relevant to that determination. It not only bore upon the future shipping needs which were likely but also underscored the danger of delays in resuming the service if the field were left exclusively to existing carriers.

If the Commission were required to deny these applications unless it found an actual inability on the part of existing carriers to acquire the facilities necessary for future transportation

needs, a limitation would be imposed on the power of the Commission which is not found in the Act. The Commission is the guardian of the public interest in determining whether certificates of convenience and necessity shall be granted. For the performance of that function the Commission has been entrusted with a wide range of discretionary authority. *Interstate Commerce Commission* v. *Parker*, 325 U. S. —. Its function is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies. Its doubt that the public interest will be adequately served if resumption of service is left to existing carriers is entitled to the same respect as its expert judgment on other complicated transportation problems. See *Chesapeake & Ohio R. Co.* v. *United States*, 283 U. S. 35, 42; *Alton R. Co.* v. *United States*, 315 U. S. 15, 23. Forecasts as to the future are necessary to the decision. But neither uncertainties as to the future nor the inability or failure of existing carriers to show the sufficiency of their plans to meet future traffic demands need paralyze the Commission into inaction. It may be that the public interest requires that future shipping needs be assured rather than left uncertain. The Commission has the discretion so to decide. It went no further here.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.